ERNEST BACK ET AL.

IBLA 93-198 Decided April 26, 1996

Appeal from a decision of the Director of the Lexington, Kentucky, Field Office, Office of Surface Mining Reclamation and Enforcement, refusing to order a Federal inspection in response to a citizen complaint.

Appeal dismissed in part; decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

Upon review of action taken by the state regulatory authority in response to a 10-day notice, OSM is obligated to conduct an inspection unless the state takes appropriate action to cause the violation to be corrected or shows good cause for failure to do so. [illegible] analysis of the facts in the absence of a showing that the finding was arbitrary, capricious, or an abuse of discretion under the state program.

APPEARANCES: Ernest Back, pro se; Margaret H. Poindexter, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Ernest Back and Burgess Sorrells have brought this appeal from a decision of the Field Office Director, Office of Surface Mining Reclamation and Enforcement (OSM), Lexington, Kentucky, reaffirming his prior decision and refusing to order a Federal inspection in response to appellant Back's citizen complaint. The complaint asserted that Diamond May Coal Company was conducting surface coal mining operations on permit No. 860-8006 within 300 feet of an occupied dwelling in violation 405 KAR 24:040. The complaint specifically addressed Diamond May's coal loadout facilities situated within 300 feet of Back's home.

In response to the complaint, OSM issued a 10-day notice (TDN), No. 92-83-408-53, to the Kentucky Department for Surface Mining Reclamation and Enforcement (DSMRE), directing DSMRE to take appropriate action to abate the alleged violation or show good cause for a decision not to take action. Surface Mining Control and Reclamation Act of 1977 (SMCRA), section 521(a)(1), 30 U.S.C. § 1271(a)(1) (1994). The asserted violation identified in the TDN was the failure to obtain a "waiver to operate within 300 feet of an occupied dwelling."

The response from DSMRE was a finding that the only area within 300 feet of a residence "was existing and operational prior to August 1977 and therefore has valid existing rights [VER]" and a waiver is not required (Letter of Apr. 16, 1992). The local OSM office concluded in a letter to Back dated April 28, 1992, that DSMRE had shown good cause for not issuing a citation in that the loadout facilities predated SMCRA regulations affecting such activities. Appellant Back requested informal review of this decision asserting that the coal loadout facility did not predate enactment of SMCRA.

Upon informal review, OSM found that the permit, which was originally issued in 1979, was amended in 1984 to authorize the construction of the loadout, beltline, and stockpile area at its present location. OSM noted that the revision was predicated on a showing of a VER under State regulations as of August 3, 1977, the date of enactment of SMCRA. Specifically, OSM held that there was a legally binding lease entered into on April 20, 1977, which authorized the mining of coal and required construction of a tipple and loading facility on the lease, and, further, that the operator had demonstrated that the coal was needed and was immediately adjacent to an ongoing surface coal mining operation that had been active since the early 1970's. This appeal is brought from the decision of OSM on informal review.

On appeal, appellants have challenged the legal sufficiency of the VER determination. 1/ In particular, appellants dispute the validity of the lease contract as of August 3, 1977, on the ground the signatures of the lessors were not notarized until September 1977. Appellants also assert the lease was not recorded. Further, appellants contend that the load out is not immediately adjacent to the mine, although it is admitted to be adjacent to a haul road built prior to August 3, 1977. An answer has been filed by OSM asserting that the record demonstrates that DSMRE had good cause for failing to take any enforcement action. Specifically, OSM contends the DSMRE conclusion that under the State regulations the permittee established VER is supported by the record. Further, OSM contends that the DSMRE interpretation of the State regulatory program must be upheld in the absence of a showing that DSMRE's interpretation was arbitrary and capricious.

1/ Appellants also requested an evidentiary hearing in this case which was denied by Board order of Apr. 2, 1993.

The record in this case raises a procedural issue which is properly addressed as a threshold matter. The standing of appellant Sorrells to appeal the OSM decision is not established by the record before us. We issued a show cause order giving Sorrells an opportunity to provide further evidence of his standing to appeal the OSM decision. Sorrells responded that he is "concerned for the environment." Standing to appeal is governed by regulation: "Any person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board where the decision specifically grants such right of appeal." 43 CFR 4.1281. Although Sorrells apparently accompanied appellant Back in at least one meeting with OSM officials and has signed the notice of appeal, this alone is insufficient to establish standing to appeal the OSM decision. Further, a "concern" for the environment is insufficient to establish that appellant Sorrells has been adversely affected by the decision below. See Sharon Long, 83 IBLA 304 (1983). Accordingly, the appeal of appellant Sorrells is dismissed for lack of standing.

Under section 522(e)(5) of SMCRA no surface impacts incident to underground mining may be created within 300 feet of an occupied dwelling in the absence of a VER existing on August 3, 1977. 30 U.S.C. § 1272(e)(5) (1994); see Gateway Coal Co. v. OSM, 118 IBLA 129, 98 I.D. 70 (1991). The relevant provisions of the Kentucky regulatory program provide that VER "means property rights in existence on August 3, 1977, that were created by legally binding conveyance, lease, contract or other instrument which authorizes the applicant to produce coal" if the applicant can show "that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977." 405 KAR 24:040.4(1).

[1] When it has reason to believe that a permittee is in violation of a state regulatory program, OSM is required to issue a TDN to the state. See 30 U.S.C. § 1271(a)(1) (1994); 30 CFR 842.11(b)(1). Unless the state, within 10 days of receiving the TDN, takes "appropriate action" to cause the violation to be corrected or shows "good cause" for failure to do so, OSM is required to immediately inspect the surface coal mining operation. See 30 U.S.C. § 1271(a)(1) (1994); 30 CFR 842.11(b)(1). Under the relevant regulation, good cause is defined to include a finding that "[u]nder the State program, the possible violation does not exist." 30 CFR 842.11(b)(1)(ii)(B)(4)(i). Further, the pertinent regulation provides that "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program" shall be considered appropriate action to cause a violation to be corrected or good cause for failure to do so. 30 CFR 842.11(b)(1)(ii)(B)(2); see In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 523 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981) ("[T]he Secretary will not intervene unless [the state's] discretion is abused"). In the context of a complaint regarding structures within buffer zones, if the state declines to take enforcement action on the basis of VER, OSM must determine whether the state's finding of VER is arbitrary, capricious, or an abuse of discretion. See Lois J. Armstrong, 130 IBLA 228, 232 (1994).

The record contains a copy of a coal lease entered into April 20, 1977, by the operator's predecessor in interest. The lease grants the exclusive right of "mining, extracting, and removing and marketing all of the * * * mineable and merchantable coal located in, on, and under the leasehold." Further, the lessee is granted the right to enter upon the leased lands and erect such buildings, plants, and other structures to the extent necessary for mining, excavating, removing, and preparing the coal for marketing. Additionally, lessee is required by the lease to ship coal from a tipple and loading facilities which were to be constructed on the leasehold.

While it appears from the record that the lease was executed and dated April 20, 1977, appellants challenge the validity of the contract on the ground the signers did not acknowledge their signatures before a notary until September 1977. A signature by the lessor on a lease may be required to make the lease enforceable and remove the lease from the operation of the statute of frauds. See 49 Am. Jur. 2d Landlord and Tenant, § 28 (1995). However, appellants have not cited any authority for their assertion that a lease must have been acknowledged and recorded as a prerequisite to a binding lease. Although acknowledgement may be required for recordation of the lease, recordation is generally designed to protect against the intervening rights of third party assignees or grantees and it does not follow that recordation is a prerequisite to a binding lease. See id. at 35; cf. Godley v. Kentucky Resources Corp., 640 F.2d 831, 835 (6th Cir. 1981) (unrecorded assignment of an interest in real property in the form of a mining lease is invalid against the grantee of the property without notice). The record does not establish any deficiencies in the lease rendering the finding of VER arbitrary or capricious.

Given the existence of a legally binding lease authorizing production of coal and an ongoing surface coal mining operation for which all permits were obtained before August 3, 1977, a finding of VER under 405 KAR 24:040.4(1) requires a demonstration that "the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation." The record contains a copy of a written analysis supporting a finding of VER which was tendered with the application for revision of the permit to include the loadout facility. Therein, it is reasoned that restricting the definition of VER to coal deposits, excluding aspects of a surface mining operation which are necessary for the operation as a whole, but which do not directly produce coal, would be inconsistent with the statutory intent. Thus, the analysis on which approval of the permit revision was apparently based concluded that the VER exemption is not limited solely to coal deposits, but also embraces such surface facilities as loadouts which are necessary for the surface coal mining operation as a whole. 2/ When applying

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2/ It appears from the analysis in the record that the loadout is immediately adjacent to surface operations and impacts of an underground coal mine and, thus, by definition, a surface coal mining operation. See SMCRA, section 701(28), 30 U.S.C. § 1291(28) (1994).

the arbitrary and capricious standard to this finding, we do not substitute our judgment for that of the state regulatory agency. The analysis in the record must reflect consideration of the relevant factors. See Harvey Catron, 134 IBLA 244, 256 (1995); Lois J. Armstrong, supra at 232. The analysis relied upon reflects a reasoned approach to determining the existence of VER and we are unable to conclude that the action taken by the DSMRE was arbitrary or capricious.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part and the decision is affirmed.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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R. W. Mullen
Administrative Judge